In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1184

E. L. BOTELER, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as *Boteler* v. *State*, 363 So.2d 279 (Miss. 1978).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether or not the Court below was correct in determining that nondisclosure of the existence of certain notes in the possession of the prosecution did not result in prejudice to petitioner.

STATEMENT OF THE CASE

From July 15, 1970 to July 23, 1976 petitioner served as Director of the Mississippi Highway Department. In August of 1976 three indictments were returned charging that petitioner had embezzled $25,000, $75,000 and $100,000 in money which was the property of the State of Mississippi. On motion of petitioner, the trial court consolidated the indictments charging the $25,000 and $75,000 embezzlements, but not the $100,000 embezzlement. The jury returned a verdict of guilty on both indictments and petitioner was sentenced on each to serve a term of ten years with four years suspended and six years to be served concurrently.

STATEMENT OF THE FACTS

The facts of this case as set out in the opinion of the Mississippi Supreme Court in *Boteler* v. *State,* 363 So.2d 279 (Miss. 1978), are correct and are adopted here by reference. Where necessary, a more fully developed recitation of the factual situation appears in the argument.

ARGUMENT

Respondent contends the Mississippi Supreme Court was entirely correct in its determination that the prosecution's nondisclosure of the existence of certain notes did not result in prejudice to the petitioner.

On July 23, 1976 E. L. Boteler, petitioner herein, resigned by request from his position as director of the Mississippi State Highway Department. On July 29, 1976 John Hamilton, then director of the Legislative Audit Committee (commonly known as the PEER Committee), and a long time personal friend of petitioner went to petitioner's home to inquire about certain subjects which had arisen as the result of PEER's audit of the Highway Department. In this meeting which petitioner described as "a very pleasant meeting" and "more of a little visit than an interrogation," the two men discussed several topics including the Regional Planning Consortium and the Franklin and Lienhard contract.

During this meeting Hamilton took contemporaneous notes of the conversation which "were made with the acquiescence of Mr. Boteler."

Subsequently, at trial and during the cross-examination of petitioner, it was developed that the State learned of the existence of the five pages of handwritten notes on December 22nd, 1976 and had not furnished a copy of them to the court or counsel for defense for their inspection.

At this point the cross-examination of petitioner was interrupted and defense counsel was permitted to voir dire Hamilton out of the presence of the jury. Hamilton readily admitted the existence of the notes which he had

kept in his desk and in his exclusive possession since the July 29th, 1976 conversation.

Upon review of the notes, the trial court found them to be both of an exculpatory and an inculpatory nature and ordered them produced for the defendant's examination and recessed for a period of approximately thirty minutes. A motion for a mistrial was overruled.

Thereafter, the cross-examination of petitioner was resumed and at the close of his testimony, Hamilton was called by the state as a rebuttal witness.

On Appeal to the Mississippi Supreme Court petitioner contended: "[b]y the time the Boteler statement, as contained in Hamilton's contemporaneous notes of his interview, was finally given to defense counsel, its disclosure was virtually useless. The defendant's strategy of demonstrating that all of Mr. Boteler's conduct and statements pointed to a man who had acted in good faith and who therefore had an absolute defense, had already been laid before the jury. Predicated as it was upon his credibility, defendant's good faith defense was irreparably shattered when the state was permitted to utilize a seemingly contradictory statement which Mr. Boteler had supposedly made within a week of his resignation. Had the prosecutors informed defense counsel of the existence of this statement before trial, as was their undisputed obligation pursuant to Judge Moore's order, and of the State's intention to use it, a totally different strategy might have emerged, perhaps even to the extent to keeping appellant off the witness stand." (Brief for Appellant, p. 37)

On December 17, 1976, prior to trial, the defense filed a motion for discovery and inspection and the resultant order dated December 21, 1976 was entered nunc pro tunc on February 3, 1978.

The single issue presented here is whether the state was required to disclose to the defense the existence of five pages of contemporaneous notes of a conversation between petitioner and John Hamilton who was director of the PEER committee.

The motion for discovery and inspection, in part requested:

1. Any relevant written or recorded statement or confession made by Defendant or copies thereof within the possession, custody or control of the State of Mississippi, the existence of which is known or by the exercise of due diligence, may be known to the attorneys for the State of Mississippi.

2. All exculpatory evidence and all evidence favorable to the Defendant.

3. Any statements in the possession of the State of Mississippi, which might be helpful to the Defendant's case, other than those statements taken from prospective state witnesses.

4. A list of all relevant documents concerning the case, that the State intends to introduce into evidence at the trial of the case.

Hamilton's notes, the existence of which was unknown to the State at the time the discovery order was entered, can hardly be said to be a "written or recorded statement or confession made by defendant" as specified in the discovery motion. The notes were not in narrative form and were not adopted, approved or signed by petitioner nor did they constitute a recording or transcription "which is a substantially verbatim recital of an oral statement * * * recorded contemporaneously with the making of such oral statement" as defined by the cases construing

the Jencks Act, 18 U.S.C.A. § 3500, and while that Act does not apply to state criminal trials, the cases are instructive on the issue of what constitutes a statement by federal court standards.

As to the second paragraph of the discovery motion, it is well settled that a general request for exculpatory matter amounts to no request at all. The case of *United States* v. *Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), is dispositive of the issue:

> In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all Brady material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. (49 L.Ed.2d 342, 351)

See also *United States* v. *Rhodes*, 569 F.2d 384 (5th Cir., 1978), wherein it is stated:

> In the instant case, defense counsel's request for "all exculpatory material," as held in *Agurs*, amounted to no request at all. Therefore, unless the evidence was "obviously exculpatory" or "clearly supportive of a claim of innocence," the prosecution had no duty to disclose it. (*Id.* at 388)

Paragraph 3 of the discovery motion asks for statements which might be helpful to the defense "other than

those statements taken from prospective state witnesses" and paragraph numbered 4 asks for a list of "relevant documents which the state intended to introduce into evidence." Petitioner does not claim to have been denied any material requested in paragraphs numbered 3 and 4.

Again it is emphasized that at the time the resultant order was entered, the state was unaware of the existence of Hamilton's notes. The important issue is that *petitioner knew* of his conversation with Hamilton and saw him taking notes of their discussion. If petitioner chose not to inform his counsel of this meeting, this omission cannot be laid at the door of the prosecution.

United States v. *Prior*, 546 F.2d 1254 (5th Cir., 1977), held: ". . . numerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." [Citations omitted] (*Id.* at 1259)

To the same effect is the decision in *Smith* v. *United States*, 375 F. Supp. 1244 (D.C. Va., 1974):

> A prerequisite to relief for the nondisclosure of required information is that the defense did not have independent knowledge of and access to the evidence in question at the time of trial. See Rosenberg v. United States, 360 U.S. 367, 371, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1958); Thomas v. United States, 343 F.2d 49, 54 (9th Cir. 1965). (*Id.* at 1247)

Cf. *United States* v. *Mandell*, 415 F. Supp. 1079 (D.C. Md., 1976). A similar claim was disposed of in *Robertson* v. *Riddle*, 404 F. Supp. 1388 (D.C. Va., 1975), in this language:

> Petitioner further states that the prosecution failed to produce and show a hospital record which would

have supplied petitioner with support for his alibi defense. First of all, petitioner was as aware of the record as was the prosecution. For that reason the allegation is absurd and frivolous. (404 F. Supp. 1388, 1391)

The Fifth Circuit Court of Appeals held in *United States* v. *Romano,* 482 F.2d 1183 (5th Cir., 1973), cert. denied, *Yassen* v. *United States,* 94 S.Ct. 866, 414 U.S. 1129, 38 L.Ed.2d 753:

> . . . for the evidence that the government allegedly withheld, Lynott's whereabouts from January 15, 1971, until August 6, 1971, was uniquely in Lynott's possession and could have been introduced and proved by him at any time during the trial. (*Id.* at 1193)

In his brief for appellant at pages 1-2 it was readily conceded that "at the trial, the State conclusively established that the defendant had caused a Highway Department Imprest Fund check in the amount of $25,000 and a State Warrant in the amount of $75,000 to be issued to a fictitious entity known as the Regional Planning Consortium in April and May 1975, respectively, and that these funds were ultimately transferred to Boteler's personal account and/or utilized for his own benefit."

Petitioner "did not dispute these facts, but testified on direct examination that the checks were issued to repay him for the expenditure of a like amount of cash given to Herschel Jumper, the Highway Department Commissioner for the Northern District."

"Accordingly, in presenting his good faith defense at trial, and in attempting to maintain his credibility with the jury, it was crucial that Mr. Boteler be able to demonstrate that his testimony from the witness stand was consistent in every important respect with the version of the

decisive events which he had narrated to third parties at or about the time his actions were discovered." (Brief for Appellant, p. 34)

In the instant case there is no evidence that the prosecution had any notice prior to trial that petitioner would advance a "good faith" defense. Only after petitioner took the stand and admitted his guilt did Hamilton's notes, which he described as "memory joggers," take on any significance. "Government is not required . . . to disclose all its evidence, however insignificant, to the defense. Much less should the Government be required to disclose evidence which appears to be irrelevant." *United States* v. *Bowles,* 488 F.2d 1307, 159 U.S. App. D.C. 407, cert. denied, 94 S.Ct. 1591, 415 U.S. 991, 37 L.Ed.2d 888 (1974).

When the notes were first examined by the trial judge he stated that even if he had been shown the notes prior to trial he would not have ordered them produced. The obvious reason for this ruling is that standing alone the notes were of no discernible inculpatory or exculpatory character. After petitioner testified, the judge determined the notes were both inculpatory and exculpatory and he ordered that the notes be given to the defense. A thirty minute recess was declared so that the notes could be examined by the defense.

Hamilton was then called as a rebuttal witness and defense counsel cross-examined him extensively from the notes which the defense had previously had marked for identification and which had absolutely nothing to do with petitioner's guilt, which he himself had already admitted from the stand. *Woodcock* v. *Amoral,* 511 F.2d 985 (1st Cir., 1974), states:

> To prevail under *Brady,* of course, the appellant must show not only that *favorable evidence* was not dis-

closed *but also that the evidence was material to the issues of guilt or punishment.* E.g. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). (Emphasis added) (511 F.2d 985, 988)

Of course, petitioner was not entitled to whatever inculpatory material was contained in notes. However, the notes in their entirety were turned over to him. In *Moore* v. *Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972), the United States Supreme Court, citing *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), held:

> It [Brady] held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 10 L.Ed.2d at 218.
>
> The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the *accused and is material either to guilt or to punishment.* Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured. (Emphasis added) (33 L.Ed.2d 706, 713)

See also *DeBerry* v. *Wolff*, 513 F.2d 1336 (8th Cir., 1975) wherein it is stated the claim of nondisclosure "borders on the frivolous, for it is clear that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defense." (*Id.* at 1339-

40) Surely petitioner cannot complain that he was prejudiced by nondisclosure when his own witness, Sam Waggoner, who preceded him to the stand, testified on re-cross, "Mr. Boteler told me how the money had been deposited in his bank accounts. He had put $30,000 in Greenwood Bank and $40,000 in a Grenada Bank. One sum he gave to Mr. Guyton and the other to Mr. Jumper. He also said he had given Mr. Jumper $5,000 out of his own pocket so he had reimbursed himself from the Georgia bank. Mr. Boteler said also that he gave Mr. Jumper $25,000 from the Imprest Fund. Also, $25,000 was cashed out of the Tombigbee River Valley Water Management District and given to Mr. Boteler." (Appellant's Abstract, p. 15)

Actually, the re-cross examination went much further than Boteler's abstract filed with the Mississippi Supreme Court would lead us to believe. Waggoner testified petitioner told him the money went *first* into the bank and the Greenwood Production Credit Association and was *then withdrawn* in cash and given to Herschell Jumper and Steve Guyton. Five thousand dollars, according to this witness, petitioner accounted for by saying he withdrew that amount to reimburse himself for a like amount which he had given Jumper in cash. Regarding the Tennessee-Tombigbee check in the amount of $100,000, Waggoner testified Boteler told him he gave $25,000 to Jumper and had retained three checks in the amount of $25,000 each. These three checks were still in Boteler's possession. (Appellee's Supplemental Abstract, pp. 1 and 2)

On cross-examination, Boteler admitted he told Waggoner he had given $30,000 to Steve Guyton but denied that he had told Waggoner the money came out of a checking account. Boteler similarly denied that he told Waggoner he gave Jumper $40,000 that came out of a bank in

Greenwood. Petitioner did not deny that $25,000 had been "repaid" him from the $100,000.

Boteler concluded his testimony by stating he recalled his meeting with Waggoner with much more clarity than his conversation with Hamilton which occurred approximately one week later.

From the foregoing it is readily discernible that the testimony of petitioner's own witness, Sam Waggoner, was virtually identical to that of the State's rebuttal witness Hamilton. Surely any claim of prejudice arising from nondisclosure is without foundation.

The standards for judging the effect of nondisclosure are further discussed in *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir., 1975), cert. denied, 425 U.S. 911:

> The materiality requirement of Brady and subsequent cases is important here, for not every piece of evidence potentially useful to the defense need be disclosed. In Ross v. Texas, 5 Cir., 1973, 474 F.2d 1150, cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98, we rejected the suggestion that Brady encompasses all material which might have led a jury to entertain a reasonable doubt as to a defendant's guilt. We have instead held that before the nondisclosure of evidence reaches a level of constitutional significance, the evidence must be "crucial, critical, highly significant. . . ." Luna v. Beto, 5 Cir., 1968, 395 F.2d 35, 41 (en banc) Brown, C. J., concurring, joined by a majority of the court). (519 F.2d 184, 221)
>
> * * *
>
> "Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . *There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.*" United States v. Ross, 5 Cir., 1975, 511 F.2d 757, 762-763. See Shuler v. Wainwright, 5 Cir., 1974, 491 F.2d 1213, 1220-1224; United States v. Miller, 10 Cir., 1974, 499 F.2d 736, 744; Warren v. Davis, 5 Cir., 1969, 412 F.2d 746, 747.
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> * * *
>
> More generally, when Brady is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a *prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.* (*Id.* at 222)

At trial, petitioner attempted to portray himself as a high minded state employee interested only in seeing that the public good was served. He maintained that the money siphoned from the Highway Department was merely repayment for his personal funds he had given to Commissioner Jumper. By his own admission he knew he did not have the authority to take state monies as he did, yet he maintained throughout the trial that he was reimbursing himself even though he knew he was "bending the rules."

Then on cross-examination petitioner reiterated he had no legal authority to obtain the money as he did.

Q: You are a State Official?

A: I beg your pardon?

Q: You are a State Official? You were?

A: I was.

Q: Did you ask for an opinion from the Attorney General's Office—

A: No, sir, I didn't.

Q: Did you ask for an opinion from the State Auditor?

A: No, sir, I did not.

Q: You determined that this was a pay-back, but nothing official, right?

A: That is right.

Q: You said that you were going to pay this hundred thousand dollars, 'and I agreed that we could make these funds available, although it would be—,' and I wrote it down, and I am quoting it, 'bending the rules'?

A: That is correct.

Q: What rule did you bend?

A: Well, I am using that as symbolic. Certainly, I knew that this was something that was very much out of the ordinary.

Q: Would bending the rule mean 'unlawful?'

A: No, sir. I do not consider it unlawful.

Q: What rule was it then that you bent?

A: I said—

Q: Did you bend—

A: I said that I was using this as in the sense of being—of illustrating. Certainly, it was out of the ordinary.

Q: Then, there was no rule that you bent?

A: Mr. Peters, there was—if there was a rule, no, we are not speaking in that term. I am using this as an illustration, and I think that—that's one that I used.

Q: All right. So then, this is just a figure of speech, 'bending the rules'? You know that there were no rules available for you to get this money; isn't that right?

A: *I knew that there was no provision within the Highway Department to do this sort of thing, yes. That's exactly— Yes, I knew that there was no provision.*

Q: And you admit that you knowingly did it?

A: Yes, sir. I did it with my eyes open. I was very conscious of what was possible to be gotten in financing these bridges, and I was very conscious of the necessity of federal funding, if the State was to accomplish this, and if we were doing the proper thing for the taxpayers of the State.

Q: *And you admit that you took the money that you got from them, and deposited it, every cent of it, in one of your accounts, and paid on your loans and spent it personally?*

A: *I—yes, I did, and I only received money from the State after I paid out money for the benefit of the State.*

Q: *But the answer to the question is 'yes'? You did take the money from the State, and paid your own expenses with it?*

A: *Yes. I took the money, and—as we have outlined it here in the Court.* (Emphasis supplied) (Tr. 1111-1113)

Appellant also testified he never made any inquiry concerning what was done with the money he ostensibly gave to Herschell Jumper nor did he get any receipts from Jumper for the $125,000 allegedly delivered in cash.

In view of petitioner's admissions from the witness stand coupled with the fact that defense witness Waggoner gave testimony compatible with that offered by state's rebuttal witness Hamilton, it cannot be said that nondisclosure of the notes in question was crucial, critical or highly significant. Petitioner, by calling Waggoner to the

stand, perforce vouched for his credibility. And yet, a review of the transcript reveals that on cross-examination of Mr. Boteler relative to his conversation with Hamilton, the majority of the prosecutor's questions were evaded or answered by, I do not recall, I neither admit nor deny, or denying he had told Waggoner some of the things which Waggoner had related from the witness stand. Other answers were totally unresponsive. (Appellant's Abstract, pp. 26-27)

It cannot be asserted that pretrial disclosure would have enabled petitioner to alter in any significant way the quantum of proof in his favor for he freely admitted his guilt.

Finally, the information contained in Hamilton's notes had no impact on the credibility of any witness for the prosecution. Judged by the requirements set out in *Calley, supra,* it is clear that nondisclosure had absolutely no effect on the outcome of the trial.

Certainly there has been absolutely no showing that nondisclosure deprived petitioner of his right to due process which is the ultimate standard governing such instances.

As noted in *United States* v. *Agurs, supra,*

> For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.
>
> Nevertheless, there is a significant practical difference between the pre-trial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. (49 L.Ed.2d 342, 352)

From the case of *United States* v. *Brawer,* 496 F.2d 703 (2d Cir., 1974), cert. denied, 95 S.Ct. 628, is a quote unusually applicable here:

> Placed in perspective, the brouhaha created over the non-disclosure of the 1969 statements appears to be a contrived issue wholly lacking in merit. It was created on appeal out of a tissue of confusion and legerdemain on someone's part. (*Id.* at 705)

CONCLUSION

The petitioner's contention poses no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen Gilfoy, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, 3 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi to Samuel H. Wilkins, Wilkins, Ellington and Jones, 105 North State Street, Post Office Box 504, Jackson, Mississippi 39205.

This the 18th day of April, A. D., 1979.

KAREN GILFOY
Assistant Attorney General